No. 88-1747

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

WILLIAM GRAMMER, *Petitioner*

v.

PATTERSON SERVICES, INC., *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY OF PETITIONER TO ANSWER OF RESPONDENT

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May The Court Please:

Respondent Patterson's "statement of the case" is such a severe mistake of the basic facts, and facts that were expressly accepted by the Circuit Court for application of the law, that we would file this reply.

1. MECHANICS OF THE ACCIDENT:

Patterson argues that the accident happened because the AHIT machine was in bad order. The Circuit Court's opinion expressly indicates that Grammer was hurt because he had to stand near the pipe that failed; and that the pipe failed

because it was defective; the test was designed to cause defective pipe to fail; otherwise, the test had no purpose. (And this was exactly Patterson's argument at trial: "What happened was supposed to happen.") When the machine was put to normal use, it could automatically disengage the pipe so that the laborers could stand clear if the pipe exploded. The Circuit Court expressly found that Patterson's orders to overtorque (overtighten) the pipe 1,000 per cent disabled the machine from automatically disengaging the pipe; so, the laborers had to walk right up to a possible ticking bomb to defuse it before it went off.

(The District Court found that without Patterson's orders the work was not "inherently dangerous" and withdrew that theory from the jury; it took Patterson's negligence to make the work that dangerous.)

The Circuit Court expressly indicated that but for Patterson's orders Grammer would not have gotten hurt because he would have been standing clear instead of right next to the pipe to manually disengage it. The jury found that Patterson's order was negligence under the circumstances and such negligence was a proximate cause of Grammer's injury.

When Patterson's orders were carried out, "maximum torque, closed safety vents," the AHIT machine then "malfunctioned" for the same reason a toy balloon "malfunctions" when a child puffs too much air into it. There was nothing wrong with the AHIT, just as there was nothing wrong with the balloon. Patterson's efforts to dodge the factual conclusions of the Circuit Court simply will not serve.

2. THE CONSTITUTIONAL ARGUMENT:

Patterson urges that Grammer argues that any NOV is inherently unconstitutional, and then Patterson speaks of desperate arguments: if Grammer had thought that every NOV or even every erroneous NOV was unconstitutional, he would hardly have discussed "mere judicial error" when NOV is granted in error.

Obviously, the vast majority of erroneous NOVs present no contitutional question, but a small minority do and the NOV here is clearly in that minority. As for desperation, no doubt we are desperate. We imagine most people in our situation are desperate, but that is no reason for abolishing certiorari; we are desperate, not our argument.

We are not presumptuous; we will take anything we can get out of this appeal and be glad, if nothing more than a remand to the District Court so the Trial Judge can see if a new trial should be granted.

3. When Patterson argues about workmen's compensation, it believes that it is accomplishing sly prejudice against Grammer in the eyes of what it considers a nine-member lay jury, apparently. If it did not believe that it was addressing a lay jury, it would not have made such an irrelevant argument.

4. Patterson cites two cases about new trial; Patterson says that they stand for the proposition that there should be no new trial here even if Grammer is surprised by the insertion of a new element of proof by the Circuit Court. In both cases cited by Patterson, the *District Court* had granted both a judgment NOV and a new trial should the NOV not stand up on appeal; the Circuit Courts simply held that a submissible case had been made out and that

there was no need for a new trial in the light of the notes of evidence adduced, *and reinstated the verdicts*; the District Courts had granted new trial in these two cases because of a perceived paucity of evidence on elements of recovery *that were already in the law*, not on an element that they were introducing for the first time as a novelty. What this has to do with Grammer's plea of surprise is hard to discern, since he proved everything that the law required until he got to the Circuit Court.

If Grammer loses a fair fight, he expects no one to show him pity. Patterson's answer is not a fair fight; it appears an intent to mislead this Court on basic facts.

In its answer Patterson argues its case as if to a lay jury and a lay jury who spend all their time sleeping in the box. So intimates Patterson; otherwise, it would not have made such jury arguments.

Whatever the state of the AHIT machine, the jury found that Patterson's negligent order was a cause of Grammer's injury.

Before Patterson's orders, the laborers could stand clear of the danger; afterwards, they could not. Patterson was a professional provider of pipe.

The petition for certiorari should be granted.

Respectfully submitted,

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